

1991

Copper State Leasing Company v. Carver Hunter, Inc. : Brief of Appellant

Utah Supreme Court

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910697CA IN THE SUPREME COURT
STATE OF UTAH

COPPER STATE LEASING COMPANY, :

Appellant, :

vs. :

CARVER HUNTER, INC., a
corporation, KIM C. MOORE,
RANDY J. BUSHNELL and LAWRENCE
D. HUNTER, :

Defendants, :

KIM C. MOORE, :

Appellee. :

Supreme Court No. 910174
Priority 16

91-0697-CA

BRIEF OF APPELLANT

APPEAL FROM A DISMISSAL OF PLAINTIFF'S CAUSE OF ACTION
AGAINST KIM C. MOORE FOR FAILURE TO PROSECUTE,
ENTERED IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE KENNETH RIGTRUP,
DISTRICT COURT JUDGE, PRESIDING.

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FILED

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UTAH

IN THE SUPREME COURT

STATE OF UTAH

COPPER STATE LEASING COMPANY,	:	
Appellant,	:	
vs.	:	
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RANDY J. BUSHNELL and LAWRENCE	:	
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SUPREME COURT, STATE OF UTAH

COPPER STATE LEASING COMPANY,	:	
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D. HUNTER,	:	
Defendants,	:	
KIM C. MOORE,	:	Supreme Court No. 910174
Appellee.	:	Priority 16

BRIEF OF APPELLANT

* * * * *

Appellant, Copper State Leasing Company, (hereinafter "Copper State") by and through its counsel of record, hereby submits this brief.

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

1. This Appeal is taken pursuant to Rules 3 and 4, Utah Rules of Appellate Procedure. The Supreme Court of Utah has jurisdiction over this matter pursuant to Title 78-2-2(3)(j), Utah Code Ann. 1953 as amended.

2. This Appeal is from a dismissal with prejudice of Plaintiff's Complaint for failure to prosecute.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the lower Court abuse its discretion in dismissing Appellant's Complaint with prejudice, based upon Appellee's Motion

to Dismiss?

2. Does the sua sponte dismissal of Appellant's Complaint, with prejudice by the lower Court for failure to prosecute, constitute an abuse of discretion under Rule 41(b), Utah Rules of Civil Procedure?

3. Was it a reversible error for the lower Court to enter Findings of Fact, Conclusions of Law and Order when timely objections had been filed thereto, without any response to the objections and without a hearing?

STANDARD OF REVIEW

1. The standard of review of a dismissal by a lower Court, for failure to prosecute pursuant to Rule 41, Utah Rules of Civil Procedure, is an abuse of discretion standard. Wilson vs. Lambert, 613 P.2d 765 (Utah 1980).

2. The propriety of the entry of Findings of Fact, Conclusions of Law and an Order, over objection and without hearing is a question of law subject to review for correctness, without deference to the Trial Court's legal conclusions. Barber vs. Farmers Insurance Exchange, 751 P.2d 248 (Utah App. 1988).

DETERMINATIVE RULES AND STATUTES

Rule 41(b), Utah Rules of Civil Procedure:

Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as

trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Rule 4-504(1) and (2), Utah Code of Judicial Administration,

Statement of the Rule: (1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days or within a shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

STATEMENT OF THE CASE

Copper State filed a Complaint on or about April 24, 1985 against Carver Hunter, Inc., a corporation, Kim C. Moore, Randy J. Bushnell and Lawrence D. Hunter. The liability of the corporate Defendant was based upon a Commercial Lease Agreement. The individuals' liability was based upon guaranty of the Lease Agreement. Subsequent to the filing of the Complaint, all the Defendants except Kim C. Moore filed bankruptcy petitions. No further action occurred in the District Court proceeding until an Order to Show Cause was filed by the Court on December 1, 1986. This Order to Show Cause was stricken due to the pending bankruptcies. After Carver Hunter, Inc.'s bankruptcy was dismissed for failure to comply with the provisions of a confirmed Plan, new

counsel for Plaintiff filed an Entry of Appearance and filed a Motion for Summary Judgment in this matter on November 19, 1990. Moore initially responded pro se through a series of motions and responses, including a Motion to Change Venue, Motion to Dismiss and Response to Motion for Summary Judgment. Thereafter, Moore retained counsel who filed additional pleadings on behalf of Moore, which were in essence duplicates of Defendant Moore's pro se responses and Motions.

Prior to the hearing on Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Dismissal, the Court denied Moore's Motion for Change of Venue. Thereafter, at the hearing, Defendant's Motion for Dismissal was argued first. In ruling from the bench, the Honorable Kenneth Rigtrup dismissed the Plaintiff's Complaint with prejudice for failure to prosecute. Argument was not made thereafter on Plaintiff's Motion for Summary Judgment.

Counsel for Defendant Moore prepared proposed Findings of Fact, Conclusions of Law and an Order. Counsel for Plaintiff objected to the proposed Findings. Without a hearing on Plaintiff's objection, the Court entered the proposed Findings of Fact, Conclusions of Law and Order as prepared by counsel for Moore on April 3, 1991. As a result of the Court's rulings, Plaintiff has filed this Appeal.

STATEMENT OF FACTS

1. On or about April 24, 1985, a Complaint was filed against Carver-Hunter, Inc., a corporation, Kim C. Moore, Randy J. Bushnell and Lawrence D. Hunter. (R. 2 through 12).

2. The liability of the corporate Defendant was predicated on the execution of a Commercial Lease Agreement. (R. 4).

3. The liability of the individual Defendants, including Appellee Kim C. Moore, was predicated upon the execution of guarantees of the aforementioned Lease Agreement. (R. 10).

4. Appellee answered Plaintiff's Complaint on May 6, 1985. (R. 19).

5. All other named Defendants filed bankruptcy. (R. 34).

6. An Order to Show Cause was issued by the Court on December 1, 1986. (R. 33).

7. On January 7, 1987, the Court's Order to Show Cause was stricken due to the pending bankruptcies. (R. 34 and 35).

8. No action was taken by either party until Plaintiff filed a Motion for Summary Judgment on November 21, 1990. (R. 38).

9. On December 3, 1990, Appellee pro se, filed a response to Plaintiff's Motion for Summary Judgment and also requested a hearing on Defendant's long outstanding Motion for Change of Venue. (R. 70, 72 and 20).

10. Appellee also filed a Motion to Dismiss. (A copy is attached as Exhibit "A" in the Addendum. This Motion has been supplemented to the Court record by Stipulation, as for some unexplained reason this Motion is not in the Court record.)

11. Appellant responded to Defendant's Motions by filing a Memorandum in Response to the Motion to Dismiss, Reply Memorandum in Support of its Motion for Summary Judgment and Supplemental Affidavit of Chris Davis. (R. 75, 80 and 92). Appellant also

filed a Notice to Submit for Decision at the same time. (R. 87).

12. Thereafter, Appellee retained counsel, who filed a series of additional pleadings as identified below, which are essentially duplicates of Moore's pro se responses.

a. Memorandum in Support of Motion for Change of Venue. (R. 101).

b. Supplemental Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment. (R. 107).

c. Affidavit of Kim C. Moore. (R. 121).

d. Motion for Dismissal. (R. 124).

e. Memorandum in Support of Motion for Dismissal. (R. 126).

f. Motion for Decision and Oral Argument. (R. 99). (Copies of the Motion for Dismissal, Memorandum in Support and Affidavit are attached hereto as Exhibit "B" to the Addendum).

13. Subsequently, Plaintiff filed a series of responsive pleadings as follows:

a. Memorandum in Opposition to Defendant's Motion for Change of Venue. (R. 130).

b. Memorandum in Response to Defendant's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. (R. 142).

c. Second Supplemental Affidavit of Chris Davis in Support of Plaintiff's Motion for Summary Judgment. (R. 152).

d. Memorandum in Response to Defendant Kim C. Moore's Motion to Dismiss. (R. 154).

e. Affidavit of Chris Davis in Support of Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss. (R. 164). (Copies of the Plaintiff's responsive pleadings to the Motion to Dismiss are attached as Exhibit "C").

14. Oral argument on Copper State's Motion for Summary Judgment and Defendant's Motion to Dismiss was scheduled for March 11, 1991. (R. 89).

15. The Court ruled on Defendant's outstanding Motion for Change of Venue on February 1, 1991, denying it and allowing the litigation to continue (R. 90 and 170).

16. At the hearing of March 11, 1991, the Honorable Kenneth Rigtrup dismissed Copper State's Complaint with prejudice for failure to prosecute. (R. 173).

17. Based upon the request of Plaintiff's counsel for written Findings and Conclusions, counsel for Appellee prepared proposed Findings of Fact, Conclusions of Law and an Order, to memorialize the ruling of the Court. (R. 178 through 181). Copies of the Findings of Fact, Conclusions of Law and Order are addended hereto as Exhibit "D".

18. A timely objection was filed to the aforementioned Findings of Fact, Conclusions of Law and Order on March 27, 1991. (R. 174-177). A copy of Copper State's Objections is attached hereto as Exhibit "E".

19. The Findings of Fact, Conclusions of Law and Order were entered by the Court on April 3, 1991, without a hearing on Plaintiff's objection. (R. 181). A copy of the lower Court's Findings of Fact, Conclusions of Law and Order are attached hereto as Exhibit "F".

SUMMARY OF ARGUMENT

It is Copper State's position that the lower Court abused its discretion in dismissing its Complaint with prejudice for lack of prosecution. Copper State also believes the Court's entry of the proposed Findings of Fact, Conclusions of Law and Order without a hearing upon Plaintiff's objection was a further abuse of discretion and unnecessarily prejudices Plaintiff in that the Findings do not accurately reflect the proceeding or the basis of the Court's Order.

The dismissal of an action for failure to dismiss is an extreme remedy that should only be used by a trial court with caution. Intermountain Physical Medicine Associates vs. Micro-Dex Corporation, 739 P.2d 1131 (Utah App. 1987). The Defendant's Motion to Dismiss was based upon laches, which is an equitable remedy. Defendant did not sufficiently support his claim that the doctrine of laches should be applied in this situation and therefore the lower Court abused its discretion if it relied upon the Defendant's Motion and Affidavit in dismissing Plaintiff's Complaint.

In the alternative, if the Court entered dismissal of Plaintiff's Complaint with prejudice sua sponte, then this action was also an abuse of the Court's discretion. Plaintiff had no knowledge that the Court would consider dismissing this matter on its own Motion and rely on factors other than those set forth in Defendant's Motion and Memorandum. Further, the facts and circumstances of the case did not warrant a dismissal with

prejudice.

Copper State was actively pursuing the matter at the time the Motion for Dismissal was filed and at the time of the Court's ruling and therefore the Dismissal was inappropriate. There was no showing by the Defendant or the Court that there has been any prejudice to the Defendant which could not be remedied and therefore the Court's Order of Dismissal was an abuse of discretion.

Finally, the proposed Findings of Fact, Conclusions of Law and Order entered by the Court were entered over Plaintiff's Objection without a hearing in contravention to Rule 4-504, Utah Code of Judicial Administration. It is Copper State's position that the Findings, Conclusions and Order entered by the Court did not accurately reflect the Court's ruling from the bench and therefore denied Copper State the opportunity to have an accurate and complete record of the Court's decision, thereby creating error justifying reversal and remand to District Court.

ARGUMENT

I. THE EFFECTS OF THE DELAY AS ALLEGED BY DEFENDANT DID NOT JUSTIFY DISMISSAL OF PLAINTIFF'S COMPLAINT WITH PREJUDICE

The dismissal of Copper State's Complaint with prejudice was in error if the Court based its decision upon Defendant's Motion to Dismiss. The Defendant's Motion to Dismiss alleged that it had been harmed by the delay in the prosecution of Plaintiff's Complaint. However, the grounds alleged by the Defendant were not sufficient to justify dismissal of Plaintiff's Complaint with prejudice. In order to fully understand the minimal effects caused

by the delay and the insufficiency of the support for Defendant's Motion, it is necessary to quickly review the proceedings.

As set forth in this Statement of Facts, subsequent to Defendant Kim C. Moore's Answer to Plaintiff's Complaint, no action in this matter before the District Court occurred until the Court's own Order to Show Cause was issued on December 1, 1986. (R. 33). In response to that Order, counsel for Copper State informed the Court of the pending bankruptcies of Kim C. Moore's co-defendants and requested that the matter not be dismissed. (R. 34). Consequently, the Court ordered that the Order to Show Cause be stricken as a result of the bankruptcies. (R. 35). No further action was taken in the District Court by either party until November 26, 1990 when a Notice of Appearance of successor counsel for Plaintiff was filed with the Court, contemporaneously with a Motion for Summary Judgment, Memorandum and supporting Affidavits. (R. 36, 38, 40, 51 and 65). Thereafter, Defendant Kim C. Moore responded pro se to the Motion by filing an Answer to Motion for Summary Judgment (R. 70), a Motion to Dismiss (Exhibit "A" in Addendum), Request for Hearing on Defendant's Motion for Change of Venue (R. 72) and Request for Hearing on Defendant's Motion to Dismiss (R. 74).

Thereafter, Copper State replied to Defendant's Motion to Dismiss on the basis that the Motion stated no legal authority, and was not supported by either a Memorandum or Affidavit in support of the statement set forth in the Motion. (R. 75). Subsequent thereto, Defendant retained counsel who filed additional pleadings

in connection with Defendant's Motion to Dismiss. Those include a Motion for Dismissal (R. 124), a Memorandum in Support of Motion for Dismissal (R. 126) and Affidavit of Kim C. Moore (R. 121). Defendant's Motion for Dismissal was based upon a theory of laches.

The lower Court's ruling in dismissing Plaintiff's Complaint with prejudice states that it was based on Plaintiff's failure to prosecute. It is unclear whether this ruling is based upon Defendant's argument of laches or upon the Court's own theory concerning the matter. However, if it is based upon the Defendant's theory of laches, it is an abuse of the Court's discretion as there was not a sufficient showing for the application of the equitable doctrine of laches to dismiss Plaintiff's Complaint with prejudice.

As set forth in Defendant's Memorandum, his theory of laches was based on the following statement of fact:

The Defendant has been prejudiced by the delay in that he can no longer locate documents and witnesses which are necessary to support his defense to the plaintiff's case.

(R. 127).

It should be noted that this statement is only in the Memorandum and is not supported in any way by the Affidavit of Kim C. Moore. (R. 121). Consequently, this unsupported statement is conclusory and has no evidentiary value whatsoever upon which the Court can rely in ruling on the Motion to Dismiss. Without any factual basis, the Court had no basis upon which to make its ruling.

Further, the theory of laches does not apply as a basis for

dismissing an action when the conduct complained of occurred after filing of the action. The doctrine of laches applies as an equitable remedy to relieve a party from liability from conduct and unreasonable delay that occurred prior to the commencement of an action. It has often been referred to as an equitable statute of limitations.

As noted by the United States Supreme Court in Patterson vs. Hewitt [citation omitted]. "Some degree of diligence in bringing suit is required under all systems of jurisprudence." Just as the statute of limitations establishes the requisite degree for actions at law, so is laches the rule for equitable actions. ...as a result, while "in actions at law, the question of diligence is determined by the words of the statute..." in suits in equity the question is determined by the circumstances of each particular case.

Adair vs. Hustace, 640 P.2d 294, 300 (Haw 1982). (See, also, City of Bothell vs. King County, 723 P.2d 547 (Wash. App. 1986)).

Moore's Motion to Dismiss complains of delays which occurred subsequent to the filing of the Complaint. The equitable rule of laches does not apply in such situations. "The doctrine of laches is an equitable device designed to bar stale claims where an excessive amount of time has passed prior to the assertion of a claim." Schraft vs. Leis, 686 P.2d 685, 687 (Kan. 1984) (emphasis added). Similarly, the Supreme Court of the State of California stated "...the affirmative defense of laches requires unreasonable delay in bringing suit..." Miller vs. Eisenhower Medical Center, 614 P.2d 258, 264 (Cal. 1980). (See, also, In Re Marriage of Sanborn, 777 P.2d 4 (Wash. App. 1989)).

Even assuming that the doctrine of laches applies after the commencement of the case, the Defendant did not provide a

sufficient showing that all the elements of laches were present. The elements of laches were set forth in the case of Papanikolas vs. Sugarhouse Shopping Center, 535 P.2d 1236 (Utah 1975) as follows:

To constitute laches, two elements must be established (1) the lack of diligence on the part of plaintiff; (2) an injury to defendant owing to such lack of diligence.

Id. at 1260.

Defendant Moore argued that the passage of time equated with lack of diligence. However, "...delay or lapse of time alone does not constitute laches". Bloomenthal vs. Concrete Constructors Co. of Albuquerque, Inc., 692 P.2d 50, 57 (N.M. App. 1984). (See, also, Moore vs. Phillips, 627 P.2d 831 (Kan. App. 1981)). Lack of diligence requires an unexplained and unreasonable delay which renders enforcement of Plaintiff's cause of action inequitable. Johnson vs. Estate of Shelton, 754 P.2d 828 (Mont. 1988).

While there was certainly delay in this matter, the Defendant has pointed out no delay which was unexcused or due to a lack of diligence. Further, Plaintiff's Memorandum in Response and supporting Affidavits (R. 154 and 164) clearly provide reasons for the delay. Those included the fact that Defendant Moore's co-obligors filed bankruptcy. A further explanation of delay is the fact that Copper State had assigned its interest in the contract to a third party, Lease West, to collect on the obligation. After Copper State was placed into liquidation by the Utah Department of Financial Institutions, the receiver/liquidator canceled the executory contract of Lease West and demanded back the assigned

accounts. Lease West refused to return the accounts and litigation was commenced to force the return of the accounts. Ultimately, this account was returned and Copper State began steps toward pursuing Moore, the sole remaining non-bankrupt Defendant.

On the basis that there has been a reasonable explanation of the delays, coupled with the fact that Defendant made absolutely no showing of prejudice, the Court's dismissal of Plaintiff's complaint was an abuse of discretion and should be overruled.

In addition, it has been recognized that the Defendant has the same rights and obligations to proceed with litigation as does the Plaintiff. Even if the Court were to recognize the Defendant's unsupported factual statement that witnesses are no longer available, the Defendant certainly has had the opportunity to preserve evidence by the taking of depositions and performing other discovery to preserve evidence in his favor. Clearly, Rule 4-104, Utah Code of Judicial Administration provides that any party may certify a matter as ready for trial. Defendant having elected not to take any action in this case, cannot now complain that it has been prejudiced by the mere length of time it has taken Plaintiff to pursue the one non-bankrupt Defendant.

Therefore, Copper State believes Plaintiff's Motion to Dismiss was legally and factually insupportable and therefore provided no basis for the Court to make a ruling. Because of the Court's requirements to review all facts under the totality of the circumstances, Department of Social Services vs. Romero, 609 P.2d 1323 (Utah 1980), the lower court abused its discretion in

dismissing Plaintiff's Complaint with prejudice. Therefore, this Court should overrule the Court's Order, deny Defendant's Motion to Dismiss and remand to the lower Court for consideration of Plaintiff's Motion for Summary Judgment.

**II. SUA SPONTE DISMISSAL FOR FAILURE TO PROSECUTE
WHEN AN ACTION IS BEING PURSUED IS AN ABUSE OF DISCRETION**

The basis of the Court's dismissal of Plaintiff's cause of action was for failure to prosecute. Though neither the Court's minute entry nor the Order entered by the Court specifically states, the Order was presumably based upon Rule 41(b), Utah Rules of Civil Procedure, which reads in relevant part as follows:

Involuntary Dismissal; effect thereof. For failure of the plaintiff to prosecute or comply with these rules or any order of court, the defendant may move for dismissal of an action or of any claim against him. ...Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision... operates as an adjudication upon the merits.

In the present matter, Appellee did not move the Court under Rule 41(b) to dismiss for failure to prosecute. As set forth in Point I above, Appellee's Motion to Dismiss was based upon laches. However, the Court dismissed Copper State's cause of action for failure to prosecute.

As the Appellee did not bring his Motion on this basis, it is Copper State's belief that the Court relied on its own legal theory as the basis for its ruling. While the Court has the authority to dismiss for failure to prosecute, it must exercise this power only if there is no excuse for delay. Westinghouse El. Sup. Co. vs. Paul W. Larsen Con., Inc., 544 P.2d 876 (Utah 1975). A dismissal on this basis must not be unreasonable or arbitrary and is subject

to review for abuse of discretion. Id. Further, there are certain factors to be considered.

Some consideration should be given to conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most important, whether injustice may result from the dismissal.

Id. at 879.

Had these factors been considered by the lower court and been given the appropriate weight, Plaintiff's Complaint should not have been dismissed. Therefore, the Court's decision was an abuse of discretion and should be overruled. This is clear when the application of these factors in cases previously ruled on by this Court are examined.

The Supreme Court in Westinghouse noted that the defendants in that case had not sought the Court's assistance to bring the matter to any sort of conclusion. Id. The Court was "not impressed that the defendants themselves were overly diligent or manifest any particular haste in getting the pre-trial discovery procedures completed and on with the trial." Id. The Supreme Court went on to overturn the dismissal for failure to prosecute stating:

...[I]t is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle, the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse unless it will result in substantial prejudice or injustice to the adverse party. It is our conclusion that the trial court failed to give proper weight to the higher priority and that under the circumstances described herein, the order of dismissal was an abuse of discretion.

Id.

A similar result was reached in Johnson vs. Firebrand, Inc., 571 P.2d 1368 (Utah 1977). In the Firebrand case, the Court relied on three (3) factors. First, the Court noted that "neither party had any active interest in the matter for nearly four (4) years". Id. at 1369. This is comparable to the present matter in which neither party, including Appellee, took any action for a period of five (5) years. Second, the Court noted that new counsel had recently entered an appearance on behalf of the Plaintiff after which the matter was reactivated. Id. Again, this is comparable to the present action in which new counsel filed an appearance on behalf of Copper State on November 21, 1990 and filed a Motion for Summary Judgment contemporaneously therewith.

Finally, the Supreme Court in Firebrand relied on the fact that neither party explained their inactivity. In considering that factor, the Court stated: "Since either party could have brought the matter to a conclusion, it is difficult to see why the Plaintiff should be denied his claim...". Id. at 1369. In the present matter, Appellee has offered no explanation for his failure to take any action during the interim. Though he filed a Motion to Dismiss based upon laches, he filed no Affidavit in support thereof. Consequently, there is no evidentiary material in the record supporting any claim of prejudice or offering any explanation for Defendant's failure to take action. Copper State, on the contrary, was, as reflected by the record, involved in bankruptcy proceedings with all of the Appellee's co-defendants.

After examining the conduct of the parties, the Supreme Court in Firebrand overturned the dismissal stating:

The conduct of all parties cannot be readily explained; and in view of the fact that new counsel caused the case to be activated, it seems the court abused its discretion in dismissing the case on a motion to dismiss that was filed at the same time as the answer.

Id. at 1370.

In the present matter, new counsel not only reactivated the case, but filed a Motion for Summary Judgment prior to the Defendant filing any Motion to Dismiss and well prior to the date the Court dismissed the matter sua sponte for failure to prosecute. During the interim between the filing of the two (2) potentially dispositive Motions and the scheduled hearing the Court even ruled on Appellee's outstanding Motion for Change of Venue, denying it, without any indication that the case was not being properly pursued. In light of the holding in Firebrand, the Third District Court's action constitutes an abuse of discretion.

A more recent Utah case, Maxfield vs. Rushton, 779 P.2d 237 (Utah App. 1989), reviews the foregoing cases and provides a thorough examination of factors which should be considered in a Motion to Dismiss for failure to prosecute. The Court stated:

The factors which we consider may include the following:

1. The conduct of both parties;
2. the opportunity each party has had to move the case forward;
3. what each of the parties has done to move the case forward;
4. what difficulty or prejudice may have been caused to the other side; and
5. most important, whether injustice may result from the dismissal.

Id. at 239.

In the Maxfield case, the dismissal for failure to prosecute was upheld. However, there is a clear factual distinction between Maxfield and the present matter. The Court of Appeals noted in Maxfield that the defendants had filed four (4) separate Motions indicating their readiness for trial. Id. at 240. The Court further noted that the defendants pursued discovery, including the taking of depositions, and were forced to file Motions to Compel against the plaintiff. Consequently, it appears as if the plaintiff in Maxfield was involved in a course of conduct amounting to intentional, or at least unexcused, delay.

Further, it was noted in the Maxfield case that there was evidence that the defendant's witnesses had become unavailable in the nine (9) years the case was pending. In the present matter, there is no evidence that the Appellee suffered any prejudice. A statement to that effect is made in his Memorandum (R. 127), but that statement is unsupported by any reference to an Affidavit or any other portion of the record. Of course, as a result of the dismissal in the present action, Copper State has suffered the extreme prejudice of losing its opportunity to have its action heard on the merits, creating the greater injustice that the Court in Maxfield said should be avoided.

There have been similar decisions by Federal Courts in reviewing dismissals for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The rulings of Federal Courts are generally considered persuasive authority on the

interpretation of the Utah Rules of Civil Procedure, due to the fact that they were patterned thereafter. Winegar vs. Slim Olson, Inc., 252 P.2d 205 (Utah 1953); Wilson vs. Lambert, 613 P.2d 765 (Utah 1980). Federal Courts, while citing numerous factors to consider, tend to rely very heavily on the proposition that a matter should not be dismissed for failure to prosecute when it is currently being actively pursued. Applebaum vs. Ceres Land Co., 546 F.Supp. 17 (1981). (See, also, Rawlins vs. United States, 286 F.2d 761 (9th Cir. 1961)).

This proposition is also supported by state courts of neighboring jurisdictions.

When the plaintiff has resumed work on the case and is diligently prosecuting at the time the motion is filed, the motion should not be granted since the policy favoring resolution of a case on its merits is more compelling than the rationale of Rule 41(b) which is to prevent unreasonable delay.

Timber Tracts vs. Fergus. Elec. Co-Op., 753 P.2d 854 (Mont. 1988).

This rule was similarly stated by the Supreme Court of Nevada in Spiegelman vs. Gold Dust Texaco, 539 P.2d 1216 (Nevada 1975), wherein the Supreme Court of Nevada stated:

However, if the claim is presently being prosecuted with diligence it cannot be dismissed because at some earlier time plaintiff did not act diligently.

Id. at 1218 (citing: 9 C. Wright, Federal Practice and Procedure, Civil §2370 at 204).

In the present matter, Copper State was actively pursuing the matter at the time it was dismissed by the Court. A Notice of Entry of Appearance of Counsel on behalf of Copper State was filed with the Court on November 26, 1990. That same date, Copper

State's Motion for Summary Judgment with supporting Memorandum and Affidavit were filed. Defendant responded to that Motion and Plaintiff filed a Reply Memorandum and a Notice to Submit for decision all of which were filed with the Court on or prior to December 5, 1990. Consequently, a fully dispositive motion was before the Court over four (4) months prior to the time the Court dismissed the Plaintiff's action sua sponte.

Additional evidence of the lower Court's abuse of discretion is its failure to consider imposing on Plaintiff lesser sanctions for the alleged prejudice suffered by the Defendant. (R. 174). The United States Court of Appeals, Fifth Circuit, overturned a dismissal for failure to prosecute under Rule 41(b), for the simple reason that the District Court failed to examine less severe sanctions.

However, we are compelled to vacate the dismissal with prejudice because nothing in the record indicates that less severe sanctions were considered or, if considered, deemed futile.

McCloud River R. Co. vs. Sabine River Forest, 735 F. Supp. 879, 883 (1984).

In the matter presently before this Court, less severe sanctions were not considered, even though proposed by Plaintiff. (R. 174). Based upon the controlling factors that should have been considered by the Court, the fact that the matter was being actively pursued and because the Court refused to consider lesser sanctions, dismissal of Plaintiff's Complaint with prejudice was an abuse of discretion. Copper State requests this Court to overrule the Court's Order and remand for consideration of Plaintiff's

Motion for Summary Judgment.

**III. ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND AN ORDER
OF DISMISSAL, WITHOUT REVIEW OF PLAINTIFF'S OBJECTIONS
THERE TO CONSTITUTES REVERSAL ERROR**

Findings of Fact, Conclusions of Law and a tentative Order were prepared by Appellee's counsel and served on Appellant's counsel on March 22, 1991. Thereafter, on March 27, 1991 Copper State filed objections to the proposed Findings of Fact and Conclusions of Law alleging their mis-characterization of the proceedings below. (Copies of the Findings of Fact, Conclusions of Law, Order and Objection are addended hereto as Exhibits "D" and "E"). Such objections are permitted pursuant to Rule 4-504 of the Utah Code of Judicial Administration which reads in relevant part as follows:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments and order shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objection shall be submitted to the court and counsel within five days after service. (Emphasis added).

The record establishes that Copper State's objections were properly and timely filed with the Court under Rule 4-504. Though the rule does not specifically state that a party filing such objections is entitled to a hearing thereon, this can be reasonably inferred from the fact that a right to object, without a right to those objections being heard, is meaningless. Further, no response

was ever filed by the Appellee to Plaintiff's objections. Nevertheless, with no response in the file to Copper State's objections and without any hearing on those objections, the Court signed the proposed Findings of Fact, Conclusions of Law and entered the Order dismissing Plaintiff's cause of action on April 3, 1991. Copper State was thereby denied the right to have the Court's full decision making process made part of the record. The entry of the Findings of Fact, Conclusions of Law and Order constitutes reversible error and a second basis justifying reversal of the Order of Dismissal of the District Court.

CONCLUSION

Kim Moore's Motion to Dismiss based upon laches was insufficient justification for the Court to dismiss Plaintiff's Complaint with prejudice. Laches is not an appropriate theory to dismiss a cause of action when the conduct complained of occurs subsequent to the filing of the Complaint. Further, there is no evidence before the Court of any prejudice to the Defendant. Therefore, under the totality of the circumstances before the Court, it was an abuse of the lower Court's discretion to dismiss Plaintiff's Complaint with prejudice, thereby doing injustice to the Plaintiff by denying it an opportunity to have this matter fully considered.

If dismissal of Copper State's cause of action was done sua sponte, such action by the Court constitutes an abuse of discretion. Copper State was actively pursuing its cause of action having recently filed a Notice of Appearance of Counsel and Motion

for Summary Judgment. That Motion, which would have been fully dispositive, had been fully briefed by the parties and was ready for decision of the Court at the time of the dismissal. Plaintiff's Motion was scheduled for hearing on the date the Court dismissed the action sua sponte for failure to prosecute pursuant to Rule 41(b), Utah Rules of Civil Procedure. This action constitutes an abuse of discretion. Though there had occurred certain delay, that delay was explained by Copper State. There is no evidence in the record of any kind of contumacious conduct or intentional delay on the part of Copper State. Similarly, the Appellee took no action to bring this matter to a conclusion. Finally, there is no evidence in the record of any prejudice to the Appellee as a result of the delay. Under these circumstances, dismissal of Copper State's cause of action for failure to prosecute was a clear abuse of discretion, especially since the lower Court did not consider lesser sanctions.

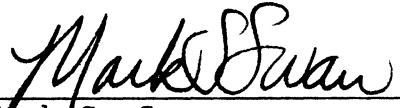
Similarly, the District Court's entry of Findings of Fact, Conclusions of Law and an Order which were prepared by counsel for the respondent, without a hearing on Copper State's objections thereto, constitutes a second error of law justifying the relief sought.

Therefore, Copper State Leasing Company respectfully requests that this Court reverse the Order of the Third Judicial District Court dismissing Copper State's cause of action and that this matter be remanded to the District Court for consideration of Appellant's Motion for Summary Judgment awarding Appellant its

costs and fees.

DATED this 11th day of September, 1991.

RICHER, SWAN & OVERHOLT, P.C.



Mark S. Swan
Attorney for Appellant
Copper State Leasing Company

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 1991, I caused a true and correct copy of the foregoing to be served upon the following parties by placing the same in the United States mails, postage prepaid, addressed as follows:

Robert A. Echard
GRIDLEY, ECHARD & WARD
Attorneys for Defendant
Kim C. Moore
632 25th Street
Ogden, Utah 84401



cs893148.c91

EXHIBIT "A"

Kim C. Moore-Defendant
4950 Quail Lane
Ogden, UT 84403

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY)	
	)	MOTION TO DISMISS
Plaintiff)	
)	
vs.)	
	)	Civil No. C85-2626
Kim C. Moore, et.al.)	
Defendants	)	Judge Kenneth Rigtrup

Defendant, Kim C. Moore, represented by himself hereby moves the court to dismiss this action based upon the following:

(1) Five and one-half years have elapsed since Plaintiff filed its complaint during which time it made no efforts to pursue its action until its recent motion for Summary Judgement.

(2) It is 'unconscionable' and probably against 'public policy' for Plaintiff to subject Defendant to the protracted uncertainties and mental stress of such needless delays.

(3) The Court issued its own Order To Show Cause in December of 1986 as to why this case should not be dismissed for failure to prosecute. Plaintiff's former counsel responded with its own letter to the Court stating that they wished to proceed immediately and that the case not be dismissed.

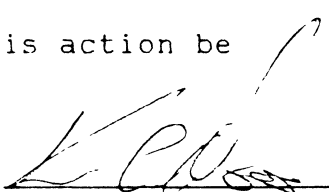
Nevertheless, Plaintiff spent an additional four years of inaction after submitting the request for non-dismissal and vowing to proceed immediately.

It should be noted that Defendant did not receive notice of this Order To Show Cause and was unaware of it until approximately three weeks ago. Although Defendant has always represented himself in this matter, the notice was apparently erroneously mailed to Counsel for the other Defendants who has never represented Defendant and did not notify defendant of the Order. Consequently, Defendant was unable to address Plaintiff's request.

(4) After this protracted period of inaction, Defendant is likely to be in a prejudiced position inasmuch as he can no longer locate witnesses in support of his defenses including those in a contemplated Amendment of Answer.

Wherefore, Defendant asks that this action be dismissed.

Dated this 28th day of November, 1990


Kim C. Moore-Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November, 1990, I caused a true and correct copy of the foregoing to be served upon the following by placing the same in the United States mails, postage paid and addressed to:

Mark S. Swan
Richer, Swan & Overholt, P.C.
311 South State Street Suite 350
Salt Lake City, UT 84111

EXHIBIT "B"

COPY

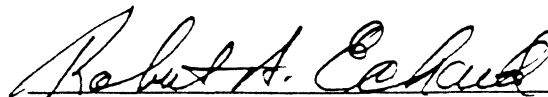
ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84401
801-621-3317
Fax: 801-621-3340

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	MOTION FOR DISMISSAL
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendants.)	

COMES NOW the defendant, Kim C. Moore, and moves the court for a dismissal of the plaintiff's Complaint for failing to prosecute and on the theory of laches as more specifically set forth in the memorandum of the defendant attached hereto.


DATED this 14 day of December, 1990.


ROBERT A. ECHARD
Attorney for Defendant
Kim C. Moore

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing MOTION FOR DISMISSAL was mailed, postage prepaid, this

14 day of December, 1990 to Mark S. Swan and Mark E. Medcalf,
Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake
City, UT 84111.


SECRETARY

COPY

ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84401
801-621-3317
Fax: 801-621-3340

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR DISMISSAL
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendants.)	

COMES NOW the defendant, Kim C. Moore, and submits the following memorandum in support of his Motion to Dismiss on the doctrine of laches or failure to prosecute.

STATEMENT OF FACTS

1. A Complaint in this action was signed on the 23rd day of April, 1985, and served upon the defendant, Kim C. Moore, on April 29, 1985.

2. No action was taken on the plaintiff's Complaint, and in December of 1986 the court issued its own Order to Show Cause as to why this case should not be dismissed for failure to prosecute. The plaintiff, through its counsel, requested the court not dismiss the action and indicated that the case would be immediately prosecuted.

3. No action was taken from December of 1986 until the motions which have been recently filed in this matter on approximately November of 1990.

4. The defendant has been prejudice by the delay in that he can no longer locate documents and witnesses which are necessary to support his defense to the plaintiff's case.

ARGUMENT

Black's Law Dictionary, under the terms "laches," states as follows:

'Doctrine of laches,' is based upon maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert right or claim which, taken together with lapse of time and other circumstances, cause prejudice to adverse party, operates as a bar in court of equity...

The Montana Court in the case of Castillo v. Franks, 690 P.2d 427 (Mont. 1984), stated that the purpose of laches is to discourage stale demands and that the Court would refuse to interfere where there had been a gross laches in prosecuting rights or where long acquiescence in asserting of adverse rights had occurred.

The Utah Court in the case of Papanikolas v. Sugarhouse Shopping Center, 535 P.2d 1256 (Utah 1975), stated as follows:

. . . Laches is not mere delay, but delay that works a disadvantage to another. To constitute laches, two elements must be established: (1) The lack of diligence on the part of plaintiff; (2) An injury to defendant owing to such lack of diligence. Although lapse of time is an essential part of laches, the length of time must depend on the

circumstances of each case, for the propriety of refusing a claim is equally predicted upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay.

. . . The existence of laches is one to be determined primarily by the trial court; and reviewing courts will not interfere with the exercise of the trial court's discretion in the matter, unless it appears that a manifest injustice has been done, or the decision cannot reasonably be found to be supported by the evidence. . .

The Utah Court has restated the elements of laches in the cases of Leaver v. Grose, 610 P.2d 1262 (Utah, 1980), and Utah Department of Transportation v. Reagan Outdoor Advertising, 751 P.2d 271 (Utah App., 1988). The Utah Supreme Court in the case of Borland v. Chandler, 733 P.2d 144 (Utah, 1987), stated that the distinction between law and equity had long ago been abolished in the State of Utah, and that equitable defenses applied in actions at law and in actions based upon equity.

The defendant believes that this is a proper case in which to apply the doctrine of laches or the failure to prosecute. As indicated in the Statement of Facts, this case is approximately five and one-half years old. The court previously, on its own motion, issued an Order to Show Cause to dismiss in December of 1986. At that time, the plaintiff indicated that it would immediately proceed with the case. However, the plaintiff has failed to do so and took no further action in this matter until approximately November of 1990. The defendant is at a disadvantage in this matter because he can no longer locate many

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of his documents and/or the witnesses he will need to defend against the case.

It should be noted that other affidavits and motions filed before the court demonstrate that the plaintiff did not at any time send notice to the defendant concerning the Lease being in default or demand under the Guaranty Agreement signed by the defendants. The course of action by the plaintiff from the beginning has been to act in a dilatory manor. The same manner has been perpetuated throughout the term of this lawsuit. Consequently, the defendant respectfully requests that the plaintiff's Complaint be dismissed and that the defendant be granted an oral argument on this motion.

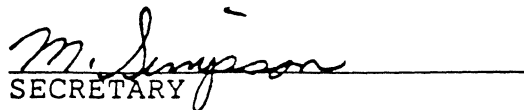
RESPECTFULLY SUBMITTED this 14 day of December, 1990.



ROBERT A. ECHARD
Attorney for Defendant
Kim C. Moore

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL was mailed, postage prepaid, this 14 day of December, 1990 to Mark S. Swan and Mark E. Medcalf, Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake City, UT 84111.


SECRETARY

OFFICES
R. ECHARD
/ARD

1 STREET
TAH 84401
21-3317
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ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84402-1850
801-621-3317
Fax: 801-621-3340

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	AFFIDAVIT OF KIM C. MOORE
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendant.)	

STATE OF UTAH)
 : ss
COUNTY OF WEBER)

KIM C. MOORE, being first duly sworn upon his oath and
having personal knowledge, deposes and says:

1. That your affiant is a defendant in the above
entitled action.

2. That on about October 10, 1980, a Lease Agreement
was entered into between Carver Hunter, Inc., a Utah corporation,
and Copper State Leasing Company. That on the same date, your
affiant signed a Guaranty Agreement. Copies of said documents are
attached hereto and incorporated by reference.

LAW OFFICES
IDLEY, ECHARD
& WARD

635 25TH STREET
OGDEN, UTAH 84401
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3. That at no time was your affiant given any notification under the terms of the Lease that the Lease Agreement was in default as required by Paragraph 21 of the Lease Agreement.

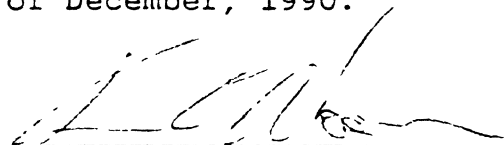
4. That at no time was your affiant given any notification, written or otherwise, of a demand that he pay under the terms of his Guaranty Agreement.

5. That as of the 10th of October, 1980, your affiant resided at 4950 Quail Lane, Ogden, Utah. During the early part of 1983, your affiant moved to 1717 Esquire, Grand Prarie, Texas. That your affiant, during the early part of 1983, notified the plaintiff of his address in Texas.

6. That your affiant did not at any time receive the letter from the plaintiff dated October 4, 1983, a copy of which is attached hereto and marked as Exhibit A.

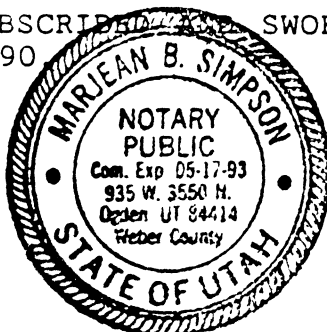
7. That at no time prior to the filing of the Complaint and Summons in this matter was your affiant notified that the Lease Agreement was in default or notified that the plaintiff had repossessed the property and proposed to sell it.

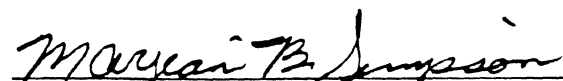
DATED this 14 day of December, 1990.



KIM C. MOORE, Defendant

SUBSCRIBED AND SWORN TO before me this 14 day of December, 1990




NOTARY PUBLIC, Ogden, Utah

My Commission Expires: 5-17-93

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing AFFIDAVIT OF KIM C. MOORE was mailed, postage prepaid, this 14 day of December, 1990 to Mark S. Swan and Mark E. Medcalf, Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake City, UT 84111.


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EXHIBIT "C"

Mark S. Swan - 3873
Mark E. Medcalf - 5404
RICHER, SWAN & OVERHOLT, P.C.
A Professional Corporation
311 South State
Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 539-8632
Attorneys for Plaintiff
Copper State Leasing Company

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,	:	MEMORANDUM IN RESPONSE TO
	:	DEFENDANT KIM C. MOORE'S
Plaintiff,	:	MOTION TO DISMISS
vs.	:	
CARVER HUNTER, INC., a	:	
Corporation, KIM C. MOORE,	:	
RANDY J. BUSHNELL and LAWRENCE	:	
D. HUNTER,	:	Civil No. C85-2626
Defendants.	:	Judge Kenneth Rigtrup

PLAINTIFF, Copper State Leasing Company (hereinafter "Copper State"), by and through its counsel of record, Mark S. Swan of the law firm **RICHER, SWAN & OVERHOLT, P.C.**, hereby submits this Memorandum in Response to Defendant Kim C. Moore's Motion to Dismiss. This Memorandum is supported by the Affidavit of Chris Davis filed contemporaneously herewith.

FACTS

1. All of Defendant Moore's co-obligors have filed bankruptcy. (See, Affidavit of Chris Davis in support of Plaintiff's Motion for Summary Judgment at Paragraphs 5 and 6).

2. Plaintiff Copper State Leasing was not in possession of the Carver-Hunter, Inc. Lease and the Guaranty of Defendant Kim C. Moore from August, 1986 through Spring, 1990. Said Lease Agreement was in the possession of a corporation, Lease West, and Copper State Leasing Company was forced to pursue a legal action in order to force Lease West to return this Lease Agreement to Copper State Leasing Company. (See, Affidavit of Chris Davis in Support of Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at Paragraphs 3 through 6).

ARGUMENT

THE DEFENSE OF LACHES WAS WAIVED

Pursuant to Rule 12(h), Utah Rules of Civil Procedure, a defense is waived if not properly raised. "A party waives all defenses and objections which he does not raise either by motion as hereinbefore provided or, if he has made no motion, in his answer." The defense of laches was not raised in the Defendants' Answer. Therefore, said defense is waived unless it was raised by Motion as provided in Rule 12(b), Utah Rules of Civil Procedure. Rule 12(b), sets forth those defenses which a party may raise by

Motion as follows:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. Improper venue;
4. Insufficiency of process;
5. Insufficiency of service of process;
6. Failure to state a claim upon which relief can be granted; and
7. Failure to join an indispensable party.

Defendants' present Motion to Dismiss, which is based upon the affirmative defense of laches, fits none of the aforementioned categories. Therefore, the defense of laches was waived pursuant to Rule 12(h). There being no cognizable legal basis for the motion, Defendants' Motion to Dismiss should be denied.

**THE DOCTRINE OF LACHES IS INAPPLICABLE TO THE
FACTS OF THIS CASE**

The defense of laches is not available to the Defendant. The Doctrine of Laches applies to unreasonable delay which occurs prior to the commencement of action. It has often be likened to the equitable version of a Statute of Limitations.

As noted by the United State Supreme Court in Paterson vs. Hewitt, [citation omitted] "Some degree of diligence in bringing suit is required under all systems of jurisprudence." Just as the Statute of Limitations establishes the requisite degree for actions at law, so is laches the rule for equitable actions. ...as a result, while "in actions at law, the question of diligence is determined by the words of the statute... in suits in equity the question is determined by the circumstances of each particular case.

Adair vs. Hustace, 640 P.2d 294, 300 (Hawaii 1982).

This rule has been similarly stated by the Court of Appeals of Washington. "Where no express statute of limitations has been established by legislative act or Court rule, the test is whether is brought within a reasonable time". City of Bothell vs. King County, 723 P.2d 547, 550 (Wash. App. 1986). In the present matter, Defendants complain of delays which occurred after Plaintiff commenced the present action. Initially, Plaintiff's cause of action against Defendant is on contract and is therefore an action at law. It is not an equity action and therefore the Doctrine of Laches does not apply. Since Plaintiff has brought the action within the applicable statute of limitations, the case should not be dismissed. Secondly, since a Statute of Limitations would have no bearing on such delays after the commencement of the action, and similarly, the Doctrine of Laches has no such application.

The rule that Laches applies only to delays occurring prior to commencement of an action is widespread. "The Doctrine of Laches is an equitable device designed to bar stale claims where an excessive amount of time has passed prior to the assertion of a claim". Schraft vs. Leis, 686 P.2d 685, 687 (Kan. 1984). (Emphasis added). The rule was similarly stated by the Supreme Court of the State of California in Miller vs. Eisenhower Medical Center, 614 P.2d 258 (Cal. 1980), in which the Court stated "As we

pointed out in Conti vs. Board of Civil Service Commissioners [citation omitted], the affirmative defense of laches requires unreasonable delay in bringing suit.... Id. at 264 (Emphasis added). Finally, "To establish laches, the Defendant has the burden of showing that... (2) there was an unreasonable delay in commencing the action;..." In Re Marriage of Sandborn, 777 P.2d 4, 6 (Wash. App. 1989). (Emphasis added). Thus, any delays occurring after the commencement of this action, could not constitute the basis for a defense of laches.

Even those cases cited by Defendant, in support of his Motion, deal with delays which occurred prior to commencement of an action. In Papanikolas Bros. Ent. vs. Sugarhouse Shopping Ctr., 535 P.2d 1256 (Utah 1975), the delay of which the defendant complained occurred prior to commencement of the action. "Defendants assert that this failure to file the action (18 months after the station was completed) constituted laches". Id. at 1260. (Emphasis added). The same is true in Leaver vs. Grose, 610 P.2d 1262 (Utah 1980), where the Court stated "...having placed Defendants on notice of the controversy that existed, certainly equity placed no further duty upon plaintiffs to immediately file a lawsuit..." Id., at 1264. (Emphasis added). Again, the delay in question was delay in the filing of a lawsuit, not the prosecution thereafter. Finally, in Utah Department of Transportation vs. Reagan Outdoor

Advertising, Inc., 751 P.2d 271 (Utah App. 1988), the delay in question was a ten (10) year delay on the part of the Utah Department of Transportation enforcing the removal of certain signs which were erected in violation of the Utah Outdoor Advertising Act. Again, post-commencement of action delay is not the issue.

THE ELEMENTS OF LACHES ARE LACKING

The Utah Supreme Court has supplied us with one (1) definition for laches.

To constitute laches, two elements must be established: (1) the lack of diligence on the part of plaintiff; (2) an injury to defendant owing to such lack of diligence.

Papanikolas vs. Sugarhouse Shopping Center, 535 P.2d 1236, 1260 (Utah 1975).

However, "...delay or lapse of time alone does not constitute laches..." Blumenthal vs. Concrete Constructors Co. of Albuquerque, Inc., 692 P.2d 50, 57 (N.M. App. 1984). Mere passage of time is not enough to invoke the Doctrine of Laches. Moore vs. Phillips, 627 P.2d 831 (Kan. App. 1981). Before the Doctrine of Laches may apply, there must be an unexplained and unreasonable delay which would render enforcement of a Plaintiff's right inequitable. Johnson vs. Estate of Shelton, 754 P.2d 828 (Mont. 1988).

Though there has been certain delay in this matter, which occurred after the commencement of the action, that delay is

reasonable and can be explained.

In August, 1986, Copper State contracted with a third party, Lease West, to collect certain of their contracts, including the Carver-Hunter obligation guaranteed by Defendant Moore. Upon the failure of Lease West to fulfill its contractual obligations, Copper State terminated that contract. However, Lease West refused to return the accounts. Thereafter, Copper State was forced to commence legal action against Lease West in order to obtain possession of the accounts. Ultimately, Copper State prevailed in the aforementioned action and ultimately obtained possession of the Carver-Hunter account in Spring, 1990. Therefore, this account was out of the possession and beyond the control Plaintiff for approximately three and a half (3 1/2) years.

Further, one of the primary causes of delay in the present action has been the sequential bankruptcy of each and every one of Defendant's co-obligors. Plaintiff was precluded, by operation of the Automatic Stay of the Bankruptcy Court, from proceeding against said co-obligors. However, the outcome of the aforementioned bankruptcies and the distribution of assets therein, had a bearing on the amount of Plaintiff's damages, and any distributions made from the bankruptcy estates of the co-obligors would only operate to benefit Defendant Moore in that said distributions would reduce the amount due and owing. Thus, Defendant Moore stood only to

benefit from those delays.

Finally, the only prejudice which the Defendant alleges he has suffered as a result of the delays is his ability to preserve and present evidence. However, the Defendant has the same rights under the Rules of Civil Procedure, to take depositions and conduct discovery and thereby preserve evidence, as Plaintiff. Further, if the Defendant failed to exercise his rights under the Rules of Civil Procedure to preserve evidence, such a failure should not enure to his benefit. Similarly, Defendant has the same right as Plaintiff, pursuant to Rule 4-104, Utah Code of Judicial Administration, to certify the matter ready for trial. "When a civil case is at issue, any party, not in default as provided in the Utah Rules of Civil Procedure may file a written Certification of Readiness for Trial". Thus, Defendant is under the same obligation as Plaintiff to move the matter to trial. Had Defendant desired to bring this matter to a conclusion prior to the resolution of the aforementioned bankruptcies of his co-obligors, he was free to do so. Defendant elected not to do so, and should not now be heard to complain.

CONCLUSION


Only certain defenses may be raised by a motion. Laches is not one of those defenses. Therefore, having not been raised in Defendant's Answer, the defense is waived. However, even if the

defense were not waived, it is not applicable to delays which occur after the commencement of an action. The Doctrine of Laches corresponds in equity to the statute of limitations. It applies only to delays which occur prior to commencement of an action. Therefore, it is not applicable to this case. Finally, even if it were applicable, the elements of laches are not present. The delay which has occurred in this matter is not the responsibility of Plaintiff. Further, the delay which occurred was reasonable under the circumstances. Finally, any prejudice which the Defendant may have suffered is not the result of the delays, but rather the result of Defendant's failure to exercise his rights under the Rules of Civil Procedure to preserve evidence.

THEREFORE, Plaintiff respectfully requests this Court to deny Defendant's Motion to Dismiss.

DATED this 28th day of December, 1990.

RICHER, SWAN & OVERHOLT, P.C.



Mark S. Swan
Attorney for Plaintiff
Copper State Leasing Company

CERTIFICATE OF SERVICE

I hereby certify that on the 31ST day of December, 1990, I caused a true and correct copy of the foregoing to be served upon the following parties by placing the same in the United States Mails, postage prepaid, addressed as follows:

Mr. Robert A. Echard
GRIDLEY, ECHARD & WARD
635 - Twenty-Fifth Street
Ogden, Utah 84401
Attorney for Defendant
Kim C. Moore

A handwritten signature in dark ink, appearing to read "Kim C. Moore", is written over a horizontal line.

cs891728.c90

Mark S. Swan - 3873
Mark E. Medcalf - 5404
RICHER, SWAN & OVERHOLT, P.C.
A Professional Corporation
311 South State
Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 539-8632
Attorneys for Plaintiff
Copper State Leasing Company

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,	:	AFFIDAVIT OF CHRIS DAVIS
	:	IN SUPPORT OF PLAINTIFF'S
Plaintiff,	:	MEMORANDUM IN OPPOSITION TO
	:	DEFENDANT'S MOTION TO DISMISS
vs.	:	
CARVER HUNTER, INC., a	:	
Corporation, KIM C. MOORE,	:	
RANDY J. BUSHNELL and LAWRENCE	:	
D. HUNTER,	:	Civil No. C85-2626
	:	
Defendants.	:	Judge Kenneth Rigtrup

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Chris Davis, being first duly sworn, depose and say as follows:

1. I am the Operations Manger for Copper State Leasing Company, (hereinafter "Copper State"), and have been at all times relevant to Plaintiff's Complaint herein and Defendants' Motion to

Dismiss.

2. In my capacity of Operations Manager of Copper State, I am personally familiar with the business records of Copper State Leasing Company as they relate to the lease obligations of Carver-Hunter, Inc., and the Guaranty obligations of Defendant Kim C. Moore.

3. On or about August 26, 1986, Copper State Leasing Company contracted with a corporation named Lease West, for the collection of certain of Copper State's accounts. Said accounts included the lease of Carver-Hunter, Inc.

4. During or about the month of November, 1987, Copper State Leasing terminated its contract with Lease West. However, Lease West refused to return accounts to Copper State Leasing, including the lease of Carver-Hunter, Inc.

5. Thereafter, a legal action was commenced in order to compel Lease West to return the Copper State accounts to Copper State. In the aforementioned action, a Motion was filed on September 21, 1989 to compel Lease West to return accounts to Copper State, including the Carver-Hunter lease.

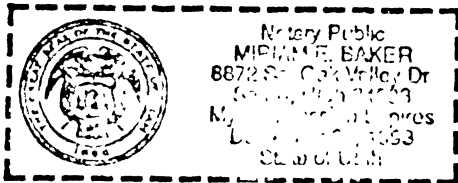
6. On or about January 24, 1990, the aforementioned Motion was granted, and during the months thereafter, Copper State's accounts, including the lease of Carver-Hunter, Inc. was returned to Copper State Leasing Company.

Further, Affiant sayeth naught.

DATED this 27th day of December, 1990.

Chris Davis
Chris Davis

Subscribed and sworn to before me this 27th day of December, 1990.



Michelle E. Baker
NOTARY PUBLIC
Residing in Salt Lake County

My Commission Expires:

12-20-93

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 1990, I caused a true and correct copy of the foregoing to be served upon the following parties by placing the same in the United States Mails, postage prepaid, addressed as follows:

Mr. Robert A. Echard
GRIDLEY, ECHARD & WARD
635 - Twenty-Fifth Street
Ogden, Utah 84401
Attorney for Defendant
Kim C. Moore

Robert A. Echard

cs891728.c90

EXHIBIT "D"

C 5 7 11

ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84401
801-621-3317
Fax: 801-621-3340

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendants.)	

The plaintiff's Motion for Summary Judgment and the defendant's Motion to Dismiss came on for hearing before the Honorable Kenneth Rigtrup on the 11th day of March, 1991, at 10:00 a.m. The plaintiff was represented in court by its attorney, Mark S. Swan, and the defendant, Kim C. Moore, was present in court and represented by his attorney, Robert A. Echard. The court having heard argument from the parties, having reviewed the memoranda and motions filed with the court, and being fully informed in the premises; now therefore, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Complaint in this action was filed in April of 1985 seeking to collect from the defendant, Kim C. Moore, pursuant to an agreement guarantying a lease between the plaintiff and the defendant, Carver Hunter, Inc. The plaintiff had repossessed the property which was security for the lease and sought to obtain a deficiency judgment against Kim C. Moore with interest at the rate of 18 percent per annum.

2. On the 1st day of December, 1986, an Order to Show Cause was issued by the court requiring the parties to show cause why the Complaint should not be dismissed for failing to prosecute and a hearing on said motion was set for January 7, 1987.

3. The plaintiff wrote a letter to the court dated December 15, 1986, in which the plaintiff committed itself to proceed with the case as soon as possible and with due diligence.

4. Thereafter, no change was made in the pleadings and no further action was taken on the plaintiff's Complaint until the plaintiff filed a Motion for Summary Judgment on November 19, 1990. The court finds that the Motion for Summary Judgment could have been filed as of January of 1987 and that nothing changed between 1987 and 1990 as between the parties.

5. The lease called for interest at the rate of 18 percent per annum and since 1986 has more than doubled; thereby causing additional cost and expense to the defendant if a judgment were to be obtained against him.

6. The plaintiff has sought to excuse its delay in prosecuting this case because of a bankruptcy that had been filed by other named defendants. Kim C. Moore did not file a bankruptcy and there was no federal stay order prohibiting the plaintiff from proceeding with its case in a timely manner.

7. The plaintiff contends that it had assigned or transferred its right in the lease, which is the subject matter of this Complaint, to Lease West from August of 1986 to 1990. If that representation is true, then the lease had been assigned prior to the December 1, 1986 Order to Show Cause issued by this court and the December 15, 1986 letter from the plaintiff agreeing to proceed expeditiously on its case. Consequently, the court finds that this fact, if true, does not justify the plaintiff in failing to prosecute its case.

8. The court finds that the plaintiff has failed to timely prosecute its case and therefore the plaintiff's Complaint should be dismissed with prejudice.

9. The court does not deal with the issues raised in the plaintiff's Motion for Summary Judgment; that motion being moot in light of the court's ruling on the defendant's Motion for Dismissal.

CONCLUSIONS OF LAW

1. The plaintiff's Complaint should be dismissed with prejudice for failing to proceed with the prosecution of its case in a timely manner.

2. The court does not rule on the issues raised by the plaintiff's Motion for Summary Judgment, the same having become moot by reason of the court's dismissal of the action for failing to prosecute.

DATED this ____ day of March, 1991.


KENNETH RIGTRUP
District Court Judge

NOTICE TO COUNSEL

TO: PLAINTIFF AND ITS COUNSEL:

You will please take notice that the undersigned attorney for Defendant Kim C. Moore will submit the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to Judge Kenneth Rigtrup for his signature upon the expiration of five (5) days from the date this notice is mailed to you, allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Code of Judicial Administration 1988. Kindly govern yourself accordingly.

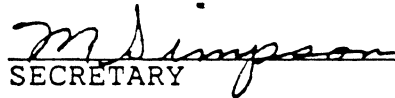
DATED this 22 day of March, 1991.



ROBERT A. ECHARD
Attorney for Defendant Moore

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postage prepaid, this 22 day of March, 1991, to Mark S. Swan and Mark E. Medcalf, Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake City, UT 84111.



SECRETARY

COPY

ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84401
801-621-3317
Fax: 801-621-3340

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	ORDER
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendants.)	

The plaintiff's Motion for Summary Judgment and the defendant's Motion to Dismiss came on for hearing before the Honorable Kenneth Rigtrup on the 11th day of March, 1991, at 10:00 a.m. The plaintiff was represented in court by its attorney, Mark S. Swan, and the defendant, Kim C. Moore, was present in court and represented by his attorney, Robert A. Echard. The court having heard argument from the parties, having reviewed the memoranda and motions filed with the court, and being fully informed in the premises; now therefore,

OFFICES
OF, ECHARD
WARD
4 STREET
UTAH 84401
821-3317
) 621-3340

IT IS HEREBY ORDERED that the plaintiff's cause of action is dismissed with prejudice for failing to prosecute in a timely manner.

DATED this ____ day of March, 1991.

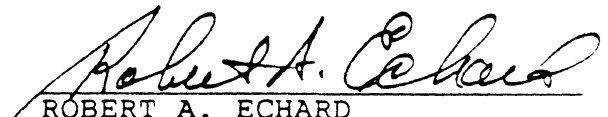
KENNETH RIGTRUP
District Court Judge

NOTICE TO COUNSEL

TO: PLAINTIFF AND ITS COUNSEL:

You will please take notice that the undersigned attorney for Defendant Kim C. Moore will submit the foregoing ORDER to Judge Kenneth Rigtrup for his signature upon the expiration of five (5) days from the date this notice is mailed to you, allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Code of Judicial Administration 1988. Kindly govern yourself accordingly.

DATED this 22 day of March, 1991.


ROBERT A. ECHARD
Attorney for Defendant Moore

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing ORDER was mailed, postage prepaid, this 22 day of

March, 1991, to Mark S. Swan and Mark E. Medcalf, Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake City, UT 84111.



SECRETARY

EXHIBIT "E"

Mark S. Swan - 3873
Mark E. Medcalf - 5404
RICHER, SWAN & OVERHOLT, P.C.
A Professional Corporation
311 South State
Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 539-8632
Attorneys for Plaintiff
Copper State Leasing Company

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,	:	
Plaintiff,	:	OBJECTION TO PROPOSED
	:	FINDINGS OF FACTS AND
	:	CONCLUSIONS OF LAW
vs.	:	
CARVER HUNTER, INC., a	:	
Corporation, KIM C. MOORE,	:	
RANDY J. BUSHNELL and LAWRENCE	:	
D. HUNTER,	:	Civil No. C85-2626
	:	
Defendants.	:	Judge Kenneth Rigtrup

COMES NOW, Plaintiff, Copper State Leasing Company, by and through its undersigned counsel, Mark S. Swan of the law firm **RICHER, SWAN & OVERHOLT, P.C.**, and pursuant to Rule 4-504, Utah Code of Judicial Administration, hereby objects to the proposed Findings of Facts and Conclusions of Law prepared by the attorney for the Defendant and submitted on March 22, 1991. This objection is based upon the fact that the Findings of Fact do not accurately

reflect the findings of the Court at the hearing held on March 11, 1991 at 10:00 a.m. The specific objections are as follows:

1. Plaintiff objects to Finding of Fact No. 3 in that the letter was from Plaintiff's predecessor counsel, and not from Plaintiff. Furthermore, the undersigned attorney and current counsel for the Plaintiff has not been able to review the Court's file and look at the reported letter and has not been able to determine whether the language is as represented in the Findings of Fact.

2. Plaintiff objects to Finding of Fact No. 6. The inference of the second sentence of that paragraph suggests that Plaintiff argued that the bankruptcy prohibited Plaintiff from pursuing Kim C. Moore. Plaintiff has never argued that position but has only argued that the effect of the bankruptcy was relevant to the issue of damages and prevented Plaintiff from establishing a liquidated damages figure as against Defendant Kim C. Moore. Consequently, a correct characterization of Plaintiff's position regarding one of the reasons for delay should be set-out in the Findings of Fact.

3. Plaintiff objects to the proposed Findings in Paragraph No. 7. No representation has been made nor has the Court found that there was an assignment of the lease prior to the December 1, 1986 Order to Show Cause. In fact, Plaintiff argued that the

assignment occurred after December 1, 1986 and argued that the acts of the assignee materially prejudiced Plaintiff and therefore it was improper to dismiss the case.

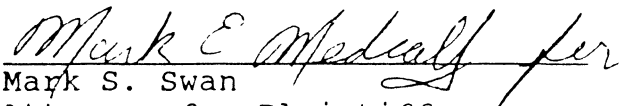
4. Plaintiff further objects to the proposed Findings of Fact on the basis that it does not include a factual statement regarding the Court's reliance on the Court record and not on Defendant's Motions or pleadings in dismissing this case with prejudice. As Plaintiff argued, Defendant filed no affidavits in support of the Motion to Dismiss. The Court clearly stated that it was relying on judicial notice of the matters in the file and implicitly dismissed this matter upon its own motion subsequent to Plaintiff's filing of the Motion for Summary Judgment.

5. In addition, Plaintiff further objects on the basis that there is no mention of the Court's finding that it would not or could not exercise equitable powers to limit the collection of interest by Plaintiff due to alleged prejudicial delay.

THEREFORE, based upon these objections, Plaintiff hereby requests the Court to consider the objection of Plaintiff and to modify the proposed Findings of Fact and Conclusions of Law and proposed Order to be consistent with the true findings by the Court and to include all findings made by the Court at the hearing on March 11, 1991 at 10:00 a.m.

DATED this 27th day of March, 1991.


RICHER, SWAN & OVERHOLT, P.C.


Mark S. Swan
Attorney for Plaintiff
Copper State Thrift & Loan

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of ^{MARCH}~~February~~, 1991, I caused a true and correct copy of the foregoing to be served upon the following by placing the same in the United States mails, postage paid and addressed as follows:

Robert A. Echard
GRIDLEY, ECHARD & WARD
635 25th Street
Ogden, Utah 84401



cs892702.c91

EXHIBIT "F"

ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84401
801-621-3317
Fax: 801-621-3340

FILED DISTRICT COURT
Third Judicial District

APR 03 1991
SALT LAKE COUNTY
By Constance George
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendants.)	

The plaintiff's Motion for Summary Judgment and the defendant's Motion to Dismiss came on for hearing before the Honorable Kenneth Rigtrup on the 11th day of March, 1991, at 10:00 a.m. The plaintiff was represented in court by its attorney, Mark S. Swan, and the defendant, Kim C. Moore, was present in court and represented by his attorney, Robert A. Echard. The court having heard argument from the parties, having reviewed the memoranda and motions filed with the court, and being fully informed in the premises; now therefore, makes the following findings of fact and conclusions of law:

LAW OFFICES
IDLEY, ECHARD
& WARD

35 25TH STREET
OGDEN, UTAH 84401
(801) 621-3317
AX (801) 621-3340

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FINDINGS OF FACT

1. The Complaint in this action was filed in April of 1985 seeking to collect from the defendant, Kim C. Moore, pursuant to an agreement guarantying a lease between the plaintiff and the defendant, Carver Hunter, Inc. The plaintiff had repossessed the property which was security for the lease and sought to obtain a deficiency judgment against Kim C. Moore with interest at the rate of 18 percent per annum.

2. On the 1st day of December, 1986, an Order to Show Cause was issued by the court requiring the parties to show cause why the Complaint should not be dismissed for failing to prosecute and a hearing on said motion was set for January 7, 1987.

3. The plaintiff wrote a letter to the court dated December 15, 1986, in which the plaintiff committed itself to proceed with the case as soon as possible and with due diligence.

4. Thereafter, no change was made in the pleadings and no further action was taken on the plaintiff's Complaint until the plaintiff filed a Motion for Summary Judgment on November 19, 1990. The court finds that the Motion for Summary Judgment could have been filed as of January of 1987 and that nothing changed between 1987 and 1990 as between the parties.

5. The lease called for interest at the rate of 18 percent per annum and since 1986 has more than doubled; thereby causing additional cost and expense to the defendant if a judgment were to be obtained against him.

6. The plaintiff has sought to excuse its delay in prosecuting this case because of a bankruptcy that had been filed by other named defendants. Kim C. Moore did not file a bankruptcy and there was no federal stay order prohibiting the plaintiff from proceeding with its case in a timely manner.

7. The plaintiff contends that it had assigned or transferred its right in the lease, which is the subject matter of this Complaint, to Lease West from August of 1986 to 1990. If that representation is true, then the lease had been assigned prior to the December 1, 1986 Order to Show Cause issued by this court and the December 15, 1986 letter from the plaintiff agreeing to proceed expeditiously on its case. Consequently, the court finds that this fact, if true, does not justify the plaintiff in failing to prosecute its case.

8. The court finds that the plaintiff has failed to timely prosecute its case and therefore the plaintiff's Complaint should be dismissed with prejudice.

9. The court does not deal with the issues raised in the plaintiff's Motion for Summary Judgment; that motion being moot in light of the court's ruling on the defendant's Motion for Dismissal.

CONCLUSIONS OF LAW

1. The plaintiff's Complaint should be dismissed with prejudice for failing to proceed with the prosecution of its case in a timely manner.

2. The court does not rule on the issues raised by the plaintiff's Motion for Summary Judgment, the same having become moot by reason of the court's dismissal of the action for failing to prosecute.

DATED this 3rd day of April, 1991.

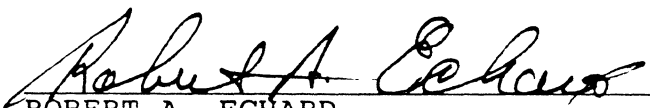

KENNETH RIGTRUP
District Court Judge

NOTICE TO COUNSEL

TO: PLAINTIFF AND ITS COUNSEL:

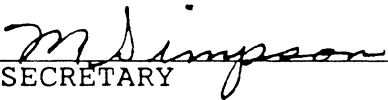
You will please take notice that the undersigned attorney for Defendant Kim C. Moore will submit the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to Judge Kenneth Rigtrup for his signature upon the expiration of five (5) days from the date this notice is mailed to you, allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Code of Judicial Administration 1988. Kindly govern yourself accordingly.

DATED this 22 day of March, 1991.


ROBERT A. ECHARD
Attorney for Defendant Moore

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postage prepaid, this 22 day of March, 1991, to Mark S. Swan and Mark E. Medcalf, Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake City, UT 84111.



SECRETARY

LAW OFFICES
DLEY, ECHARD
& WARD

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DEN, UTAH 84401
(801) 621-3317
FX (801) 621-3340

ROBERT A. ECHARD, 953
GRIDLEY, ECHARD & WARD
Attorney for Defendant Kim C. Moore
635 - 25th Street
Ogden, UT 84401
801-621-3317
Fax: 801-621-3340

FILED DISTRICT COURT
Third Judicial District

APR 03 1991

By Constance George
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

COPPER STATE LEASING COMPANY,)	
	)	ORDER
Plaintiff,)	
vs.)	
	)	Civil No. C85-2626
CARVER HUNTER, INC., a)	
corporation, KIM C. MOORE,)	
RANDY J. BUSHNELL and)	
LAWRENCE D. HUNTER,)	
	)	Judge: Kenneth Rigtrup
Defendants.)	

The plaintiff's Motion for Summary Judgment and the defendant's Motion to Dismiss came on for hearing before the Honorable Kenneth Rigtrup on the 11th day of March, 1991, at 10:00 a.m. The plaintiff was represented in court by its attorney, Mark S. Swan, and the defendant, Kim C. Moore, was present in court and represented by his attorney, Robert A. Echard. The court having heard argument from the parties, having reviewed the memoranda and motions filed with the court, and being fully informed in the premises; now therefore,


OFFICES
Y, ECHARD
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1) 621-3340

00183

IT IS HEREBY ORDERED that the plaintiff's cause of action is dismissed with prejudice for failing to prosecute in a timely manner.

DATED this 3rd day of April, 1991.


KENNETH RIGTRUP
District Court Judge

NOTICE TO COUNSEL

TO: PLAINTIFF AND ITS COUNSEL:

You will please take notice that the undersigned attorney for Defendant Kim C. Moore will submit the foregoing ORDER to Judge Kenneth Rigtrup for his signature upon the expiration of five (5) days from the date this notice is mailed to you, allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Code of Judicial Administration 1988. Kindly govern yourself accordingly.

DATED this 22 day of March, 1991.


ROBERT A. ECHARD
Attorney for Defendant Moore

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing ORDER was mailed, postage prepaid, this 22 day of

March, 1991, to Mark S. Swan and Mark E. Medcalf, Attorneys for Plaintiff, at 311 South State, Suite 350, Salt Lake City, UT 84111.


SECRETARY